In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-819

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

THE UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Claims

LAURENCE H. FROMMHAGEN
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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petitioner, LAURENCE H. FROMMHAGEN, prays herein that a writ of certiorari issue to review the granting of summary judgment to defendant UNITED STATES, the denial of petitioner's motion for summary judgment, and the dismissal of the petition by the United States Court of Claims, 573 F. 2d 52 (1978)

OPINIONS BELOW

Petitioner seeks a review of the following opinions, judgments and orders of the United States Court of Claims:

1. The Opinion and Judgment, entered on March 22, 1978, a copy of which is included herein as Appendix A.

2. The Order denying petitioner's Motion For Rehearing, For A New Trial And To Vacate The Judgment, entered June 23, 1978, a copy of which is included herein as Appendix B.

3. The Order denying petitioner's Motion For Correction Of The Judgment And For Reopening Of The Proceeding, entered on October 26, 1978, a copy of which is included herein as Appendix C.

JURISDICTION

A sixty-day extension of time until November 20, 1978, in which to file this Petition, requested by FROMMHAGEN primarily to allow time for the Court of Claims to respond to his Motion For Correction Of The Judgment And For Reopening Of The Proceeding, was granted by the Honorable WILLIAM J. BRENNAN, JR., Associate Justice Of The United States Supreme Court on September 6, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Did the Court of Claims create an illusion of prejudice to the defendant in order to raise the bar of laches?

2. Was the granting of summary judgment to the UNITED STATES consistent with the federal procedural rules and with federal appellate law?

RULES INVOLVED

Rule 56(c), Federal Rules of Civil Procedure:

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 101(d), United States Court Of Claims

Motion and Proceedings Thereon: After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rule 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On September 6, 1968, petitioner was discharged involuntarily from the Ames Research Center of the National Aeronautics and Space Administration (NASA) for the alleged reason that NASA had a vital need for a higher performance of the service performed by petitioner, namely, research in soil biochemistry.

Extensive administrative appeals to that adverse action took place in which FROMMHAGEN represented himself for the reason, as he deposed before the Court of Claims, that he was unemployed and could not afford the services of an attorney. Those proceedings ended on April 11, 1971, with a decision, adverse to petitioner, from the Board of Appeals and Review of the United States Civil Service Commission.

FROMMHAGEN stated in one of his affidavits before the Court of Claims that he requested the United States Civil Service Commissioners in 1971 and 1972 to reopen the administrative proceedings, but he never had a response from them. Defendant UNITED STATES did not contest that statement.

On April 1, 1977, petitioner filed with the United States Court of Claims a petition in which he alleged several procedural errors in the NASA adverse action and in the administrative appeals before NASA and the Civil Service Commission. FROMMHAGEN requested in that petition only backpay from September 6, 1968, the date of his discharge, to some date in 1972 or 1973 when judgment would have been rendered had he been able to file suit in the Court of Claims during 1971 or 1972. He requested the Court of Claims to fix the latter date.

On May 31, 1977, defendant UNITED STATES filed a motion for summary judgment based upon the defenses of collateral estoppel and laches. In support of the latter defense respondent asserted (1) the filling of petitioner's position with another employee, i.e., the prejudice of a 'double salary for the same service' and (2) prejudice arising from the death of NASA employees, potential witnesses in any trial. Respondent also disputed in its motion, but not by introduction of evidence, FROMMHAGEN'S statement in his petition that he had delayed filing of suit because of an extended illness.

Thereafter petitioner filed over 200 pages of opposition to defendant's motion. Included in that opposition were the affidavits of his physicians, counselors, attorneys, family, associates, and of himself showing that FROMMHAGEN was required to abstain from court challenges to the discharge action in the period of 1971 through 1977 because of his own serious illness and that of his wife, his continued unemployment and his lack of financial resources.

WILLIAM A. ATCHLEY, M.D. asserted in his affidavit that he had observed that FROMMHAGEN was suffering serious emotional disorders during the illness of petitioner's wife in 1971. In another affidavit N. MICHAEL SCHMIDT, Ph.D., a psychologist whom petitioner was consulting in the first half of 1972, came to the same conclusion after interviews and testing.

JACK SHELTON, M.D., chief of the psychiatric unit at Shasta General Hospital in Redding, California, testified in his affidavit that petitioner had been found semi-conscious lying on the edge of a freeway near that city and was admitted to the psychiatric facility on November 19, 1972, and that petitioner was released a week later in the care of his wife with the diagnosis of hysterical neurosis, dissociative type (amnesia) associated with a history of multiple psychological stressors. Dr. SHELTON also asserted that he had advised petitioner of the necessity to avoid the stressors which may have been responsible for his condition.

In other affidavits, the petitioner and his wife, parents, attorneys and associates testified that petitioner had refrained from any further direct legal challenges to the NASA adverse action due to his troubled mental condition, his doctors' orders and his financial distress.

Respondent filed no rebuttal or contravening evidence to the foregoing testimony, and fell silent on the issue of FROMMHAGEN'S ability to file suit earlier.

Defendant admitted on August 5, 1977, in answers to petitioner's interrogatories that NASA had never replaced FROMMHAGEN with another employee providing the same service.

On August 26, 1977, The Court of Claims denied petitioner's motion to file a cross-motion for summary judgment, but reversed itself on October 21, 1977, after petitioner had submitted his opposition to respondent's motion for summary judgment.

FROMMHACEN'S motion for summary judgment, filed on November 10, 1977, embraced five issues, the majority of the procedural issues he has posed in his petition to the Court of Claims.

On December 16, 1977, respondent filed opposition to plaintiff's motion for summary judgment, in which the Government requested judgment in its favor on that motion in reliance upon the administrative record and the facts asserted in petitioner's motion. Respondent did not raise any triable issues of fact in that opposition, nor did it request a trial.

Thereafter defendant filed with the Court of Claims a copy of the complete administrative record of over 9,000 pages.

Thereupon petitioner, in written representations to the Court of Claims on February 1, 1978, as in his oral argument before that court on January 18, 1978, asserted that the filing of the complete administrative record obviated the need for a trial, all of the facts pertinent to the merits of his allegations being contained in that record.

On March 22, 1978, the Court of Claims issued its Opinion (Appendix A) in which respondent's motion for summary judgment was granted solely on the ground of laches based upon the likelihood of a prolonged proceeding and an extensive trial which the Court reasoned, would be inherently unfair to the UNITED STATES due to loss of memory on the part of NASA employees and the death of NASA employees involved in the discharge action.

Respondent had never alleged any loss of memory by NASA employees nor had it specified how the deceased NASA employees were involved in the discharge action against petitioner.

In his Motion For Rehearing, For New Trial, And To Vacate The Judgment, petitioner again pointed to the fact that no trial on the issues raised by him was necessary or proper. He requested therein only a summary adjudication of his claims, or, in the alternative, a trial limited solely to the defense of laches in that triable issues of fact exist with regard to his delay

in filing the suit and the specific nature of the prejudice incurred by respondent as a result of that delay. Petitioner also denied in that motion that he had any intention of prolonging the proceeding or of vilifying his former superiors. He had stated in other representations to the Court that his discharge was due to factors external to NASA as shown in records of the Federal Bureau of Investigation, but that he would not bring those matters into the proceeding before the Court of Claims inasmuch as they belonged in another arena.

Respondent did not oppose the foregoing motion for rehearing.

In its Order denying the motion for rehearing (Appendix B) the Court of Claims acknowledged for the first time petitioner's waiver of trial and his request for only a summary adjudication, but insisted that a trial, prejudicial to respondent, was necessary to enter a "few depositions" which, the Court stated, FROMMHAGEN wished to enter into evidence. Leave to take the one deposition requested by petitioner, which would have been directed largely to respondent's defense of laches, had been denied by the Court of Claims on July 8, 1977.

In the order denying the motion for rehearing the Court of Claims ignored petitioner's request for a trial limited to the issue of laches.

On September 12, 1978, FROMMHAGEN filed a Motion For Correction Of The Judgment And For Reopening Of The Proceeding in which he pleaded with the Court of Claims to recognize that he had waived trial, discovery and introduction of new evidence and requested only a summary adjudication based upon the administrative record then on file. Respondent did not oppose that motion. The Court of Claims summarily denied that motion on October 26, 1978 (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THE CREATION OF THE ILLUSION OF A PREJUDICE TO RESPONDENT REQUIRES THE INTERVENTION AND SUPERVISION OF THIS COURT

It is well-established that lapse of time alone does not constitute laches and will not bar relief where it has not worked injury, prejudice or disadvantage to defendant, *Costello v. United States,* 365 U.S. 282 (1960); *Mogavero v. McLucas,* 543 F. 2d 1083 (1976); *Chappelle v. United States,* 168 Ct. Cl. 362 (1964); *Kowal v. United States,* 188 Ct. Cl. 631 (1969); *Levy v. United States,* 118 Ct. Cl. 110 (1948). The latter three cases in the Court of Claims involved lengthy delay periods and similar circumstances justifying the delay in filing suit.

The conclusion of the Court of Claims that laches arises from a prejudice to defendant of a trial and a prolonged proceeding suffers fatally from the very facts, as shown in the Court's Opinion of March 22, 1978 (Appendix A), that there was before the Court a complete and comprehensive administrative record[1] and that both petitioner and respondent had requested judgment in its favor on the merits of petitioner's cross-motion for summary judgment, the adjudication of which would have terminated the proceeding.

The Government had admitted that it does not suffer, from petitioner's delay in filing the suit, the prejudice of a 'double salary' or loss of records. Its initial claim of prejudice from death of potential witnesses was undermined by its willingness to have FROMMHAGEN'S cross-motion for summary judgment adjudicated on the facts in that motion and in the administrative record. Petitioner's voluntary limitation of his claim excluding the 'delay period' defeated respondent's complaint that it would have to pay salary for that period of time. No other claim of prejudice was made by the Government.

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[1]The Clerk of the Court of Claims reluctantly agreed to forward the record in that Court and the administrative record to this Court. Petitioner wishes to have that record before this Court principally to demonstrate its completeness and comprehensiveness.

The Court of Claims, in the complete absence of a corresponding pleading or suggestion by the Government, conjured up the spectre of an extensive trial and prolonged proceeding inherently prejudicial to respondent in the face of the willingness by both petitioner and respondent to have the merits of FROMMHAGEN's cross-motion summarily adjudicated on the basis of facts appearing on the face of the administrative record.

The Court of Claims was in error when it stated in its Opinion of March 22, 1978 (Appendix A) that the case of *Brundage v. United States,* 205 Ct. Cl. 502, 504 F. 2d 1382 (1964), cert. denied 421 U.S. 998 (1975) controls. *BRUNDAGE* and *FROMMHAGEN* are completely distinguishable. BRUNDAGE, in the Court of Claims and before this Court, sought a trial which was required to introduce evidence and to test credibility in regard to alleged misconduct by a former superior. On the other hand, FROMMHAGEN in his motion for summary judgment alleges procedural defects in the discharge and appellate proceedings which are apparent from the face of the administrative record, and he rejects the need for a trial.

The UNITED STATES in this action, by reason of petitioner's limitation of his claim to exclude the delay period and petitioner's sole reliance on the administrative record, not only is in the same posture as it was in 1971 or 1972, but it has benefited by the delay period due to petitioner's waiver in 1978 of a trial which he might have requested had he filed in 1971 or 1972.

It was not until the Order denying petitioner's motion for rehearing (Appendix B) that the Court of Claims acknowledged that FROMMHAGEN had waived trial and requested only a summary adjudication, but it ruled that a trial, prejudicial to respondent, is necessary because, that Court stated, petitioner wishes to enter into evidence a "few depositions". Absent from that Order were the facts that the

depositions had never been taken and that the depositions, if the Court of Claims had not denied leave to take them, would have focused upon the threshold issue of laches in respondent's motion for summary judgment.

No fewer than eight significant distortions of the facts and several vindictive statements concerning petitioner in the opinions (Appendix A and B) of the Court of Claims reflect the considerable animus on the part of that court towards FROMMHAGEN. The following two examples of distortion and invective are cited.

The Court of Claims stated in its Opinion of March 22, 1978 (Appendix A), that petitioner does not seek damages in money, but rather only a "jurisdictional dollar", vindication and vilification. It is clear from petitioner's pleadings, as he clearly stated in his motion for rehearing, that his only objective is to retrieve his backpay for the period between September 6, 1968 and some date in 1972 or 1973 in an amount ranging from $75,000 to $90,000. The latter amount of money is hardly a 'jurisdictional dollar'.

Still another instance is the assertion of the Court of Claims In Its Opinion Of March 22, 1978 (Appendix A), that no attorney would represent petitioner, a 'finding' without supporting evidence. In his motion for rehearing FROMMHAGEN included the affidavits of two attorneys, one of whom is now a justice of the California Court of Appeal, in which they testified that they had been willing to represent FROMMHAGEN in 1971 or 1972 if it had not been for his inability to pay their fees or the orders of petitioner's physicians that he abstain from legal challenges to the discharge action. In rejoinder, the Court of Claims, in its order denying petitioner's motion for rehearing (Appendix B), suggested that the attorneys "might" have raised their fees "as a pallative to outright rejection" and then went on to state that the issue was of no relevance. Such snide and callous remarks on irrelevant issues without any evidentiary foundation measure the considerable hostility of the Court towards petitioner.

The Court toyed with petitioner as the cat with the mouse before the kill. For example, first it denied him leave to file a motion for summary judgment, then reversed that decision, and finally denied him an adjudication of that motion. The Court denied him leave to take a deposition and then ruled that a trial is necessary to enter the phantom depositions. Even a cursory reading of the Court's opinions detects the Court venting its spleen on petitioner.

FROMMHAGEN demonstrated in his Motion For Correction Of The Judgment And For Reopening Of The Proceeding that he had waived trial and introduction of new evidence and had requested only a summary adjudication of his claims. It is not surprising that the Court of Claims, clinging to the illusion of prejudice it has fashioned in behalf of the UNITED STATES, was silent as to the reasons for its denial of that motion (Appendix C).

The creation of the illusion of prejudice to respondent, and the maintainence of that illusion in the face of petitioner's and respondent's waivers of trial, against the backdrop of the obvious animus of the Court of Claims, constitute an abuse so foreign to the accepted and acceptable course of federal judicial proceedings as to invoke the intervention and supervision of this Course, especially in the absence of any other appellate authority over the Court of Claims.

Petitioner respectfully suggests that the time has arrived for a prescription by this Court of strict standards, applicable to all of the federal courts, governing the imposition of the doctrine of laches. As this case demonstrates, courts can and do abuse that doctrine by weaving illusions for the purpose of denying to a party its day in court.

II. THE SUMMARY JUDGMENT GRANTED BY THE COURT OF CLAIMS VIOLATED FEDERAL APPELLATE LAW AND BLACK LETTER FEDERAL RULES.

The court should look at the record in the light most favorable to the party opposing a motion for summary

judgment, and summary judgment shall not be granted when triable issues of fact exist, Rule 56(c), Federal Rules of Civil Procedure; Rule 101(d), Rules of the United States Court of Claims; *Poller vs. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486 (1962); *Redhouse vs. Quality Ford Co.*, 511 F. 2d 414 (CA 10th, 1975); *United States vs. J. B. Williams Co.*, 498 F. 2d 414 (CA 2nd, 1974); *Passinger vs. South Cent. Bell Tel. Co.*, 505 F. 2d 612 (CA 5th, 1974); *Knapp vs. Kinsey*, 249 F. 2d 797 (CA 6th, 1957); *Sequoia Union High School vs. United States*, 245 F. 2d 227 (CA 9th, 1957).

The petition and the affidavits of petitioner, his physicians, his attorneys, his family and associates contained in his opposition to the Government's motion for summary judgment and in his motion for rehearing allege that FROMMHAGEN was unwilling and unable to file suit, or to have an attorney do so for him, in the period of 1971 through 1977 by reason of illness and financial incapacity. Those sworn allegations produced a triable issue of fact by contravening respondent's bare and unsworn statement that petitioner was able to file in 1971 or 1972.

Nevertheless the Court of Claims granted respondent's motion for summary judgment on the ground of laches and completely ignored petitioner's request for a trial limited solely to the triable issues with regard to the reasons for petitioner's delay in filing suit and the specific nature of the prejudice to respondent resulting from that delay.

The uncontroverted allegations in the petition and the affidavits submitted by plaintiff FROMMHAGEN in opposition to the Government's motion for summary judgment should have been regarded as true for purposes of adjudicating that motion, *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 763 (1975), affirmed 529 F. 2d 526 (CA 6th, 1976); *Echaide v. Confederation of Canada Life Ins.*, 459 F. 2d 1377 (CA 5th, 1972); *Melo-Sonics Corp. v. Cropp*, 228 F. Supp. 393, reversed on other grounds 342 F. 2d 725 (CA 8th, 1964); *Guinn Co. v.*

Mazza, 296 F. 2d 441 (CA D.C., 1961); *Safeway Stores v. Wilcox*, 220 F. 2d 661 (CA 10th, 1955); *Lewis v. Atlas Corp.*, 158 F. 2d 599 (CA 3rd, 1946); *Furton v. City of Menasha*, 149 F. 2d 945 (CA 7th, 1945). Indeed the Court of Claims in its Opinion of March 22, 1978 (Appendix A, pg. 2, lines 34-36 and pg. 5, lines 11-13) echoed that appellate law. However, that Court, acting from its animus toward FROMMHAGEN, found that he was willing and able to file suit earlier in flat contradiction of the uncontested allegations to the contrary in the petition and in the affidavits submitted in opposition to the Government's motion.

In its decision of March 22, 1978 (Appendix A) the Court of Claims asserted that FROMMHAGEN had dropped only "hints" that he was unable to file suit in 1971 or 1972. Those "hints" were, in reality, clearcut allegations in FROMMHAGEN'S petition and in the affidavits filed by him.

The disparity in the approach to, and resolution of a motion for summary judgment between the Court of Claims and, on the other hand, federal appellate law and black letter rules of procedure invokes a review by this Court and an exercise of its power of supervision in the absence of any other appellate authority over the Court of Claims.

RESTATEMENT OF WAIVERS

Petitioner once again waives trial, discovery and the introduction of new evidence and requests only a summary adjudication, based upon the administrative record, of *all* of the issues he posed in his petition to the United States Court of Claims.

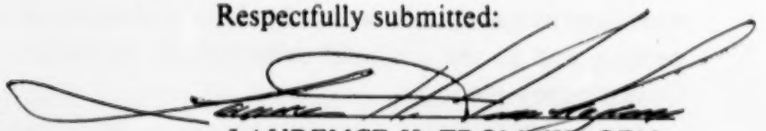
Petitioner respectfully requests the Solicitor General to hearken to the simple justice in this matter and to join with petitioner in the request that this matter be remanded to the Court of Claims for adjudication on the basis of the waiver stated above.

PRAYER

For all of the reasons stated herein, petitioner respectfully requests that a writ of certiorari issue to review the summary judgment granted to the United States by the United States Court of Claims.

Dated: November 14, 1978.

Respectfully submitted:



LAURENCE H. FROMMHAGEN
Pro Se

Appendix A

In the United States Court of Claims

No. 177-77

(Decided March 22, 1978)

LAURENCE H. FROMMHAGEN v. THE UNITED STATES

Laurence H. Frommhagen, Pro se.
Arlene Fine, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.

Before COWEN, *Senior Judge*, NICHOLS and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This case is before the court on cross-motions for summary judgment. Plaintiff appears *pro se*. It is a civilian pay case, and the petition was filed April 1, 1977. Plaintiff, a former employee of the National Aeronautics and Space Administration (NASA) at Grade-14, sues to recover back pay from his alleged illegal discharge on September 6, 1968, until September 14, 1974, when he obtained other employment, or until such other date as the court may determine after consideration of his reasons for delay in bringing suit. He does not claim reinstatement.

Defendant's motion, which was the first to be filed, set up the threshold defenses of laches and collateral estoppel. The latter, however, is readily disposed of. In *Frommhagen* v. *Klein*, reported in 456 F.2d 1391 (9th Cir. 1972), the plaintiff's district court suit was intended to test the legality of his removal from the payroll before his appeal was heard, an issue not before us. So he says and so defendant now admits. It was premature for any other purpose as he had not exhausted his administrative remedies when he filed it. Remarks in the appellate opinion that seem to pass on other issues were written gratuituously, he says. We conclude the case does not establish *res judicata* or collateral estoppel here. The laches issue is more complex, sufficiently so to require a formal, signed opinion, and the facts are indeed unusual.

Plaintiff's cross-motion for summary judgment was founded on the merits of the case and defendant in response has also discussed the merits, claiming itself entitled to summary judgment on merits grounds also. If laches is the decisive issue, however, as we believe it is, merits are not reached and need not be considered.

Plaintiff commenced a probationary employment with NASA as a GS–14 in 1962, successfully completed probation a year later, and received full career status in August 1965. His course even then was far from smooth, however, as he received a memorandum in 1964, had a "corrective interview" in November 1964, and received a letter in January 1965, all dealing with alleged weaknesses in his performance as a research scientist. Over a year before separation he was denied a within grade salary increase because of not reaching an acceptable level of competence. He seems to have had a monumental lack of rapport with supervisors and fellow employees. His troubles received the attention of the press. We assume solely for summary judgment purposes that all this was the fault of others and none of it the fault of plaintiff. He is alleged to have demanded production of 101 witnesses, all fellow employees, at his separation hearing, and to have assumed that all would be hostile. He filed a libel suit against an agency lawyer on account of a critical memorandum the latter

wrote. The case is reported as *Frommhagen* v. *Glazer*, 442 F.2d 338 (9th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972). He prosecuted matters under the agency grievance procedure, including a discrimination complaint. He claimed, and for summary judgment purposes we assume truthfully, that personal hostility towards him was the motivating factor behind his ouster.

Plaintiff is an ingenious and articulate man, but he is manifestly unhampered by the relevancy concepts of the professional lawyer. He has generally represented himself and desires no other counsel; indeed, few professionals could make life so difficult for those who stand in his way or wish to do him what he considers wrong. As is usual in pay cases having a protagonist of this type, the record is of monumental size. He says he "set out from 1966 to perfect a record so encompassing and so detailed as to all of the events and circumstances, that little or no additional testimony would be required * * *." Indeed, the slow and meticulous construction of the record became an obsession which was a large factor in plaintiff's 1972 illness. Defendant's counsel filed what she supposed was the complete administrative record, about 4,000 pages, but upon plaintiff's strenuous protest it was ascertained that there were 5,000 pages more. Since the oral argument, defendant has asked and received permission to file all this material too.

Generally speaking, in litigation, magnitude of record produces further magnitude of record, and consumption of time, further consumption of time, until eventually we get those cases that run for twenty years or more, veritable reproductions in fact of the fictional *Jarndyce* v. *Jarndyce*. While generally it is convenient to measure times for laches purposes in pay cases from exhaustion of administrative remedies to commencement of suit, evidently, if the laches rule is to serve any real purpose, and not be just another statute of limitations, judge made, we must at least consider time from the start of the controversy to the prospective date of judgment, not as a laches period itself, but in evaluating the reasonableness or excessiveness of that period. The deliberate policy of the plaintiff, boasted of

by him, must be credited with extending the time between the start of controversy and the exhaustion of administrative remedies. Likewise, if the merits ever reach our trial division, much as we admire and respect its capabilities, we doubt if it can bring the case to an end in any reasonable frame of time.

Turning, however, to the shorter period, from exhaustion of administrative remedies to commencement of suit, defendant points out that the former date was April 12, 1971, when the Board of Appeals and Review of the Civil Service Commission denied plaintiff's appeal, and suit having been brought April 1, 1977, the difference, 5 years, 11 months, and 19 days, was little short of the six-year statute of limitations and sufficient to make out a case of laches with little or no showing of actual prejudice. *Grisham* v. *United States*, 183 Ct. Cl. 657, 392 F.2d 980, *cert. denied*, 393 U.S. 843 (1968). This plaintiff, however, puts forward two considerations that give the case its unique features and require our careful consideration.

First, plaintiff cuts off his back pay claim at the date of September 14, 1974, when he regained employment, even though at a lower rate of pay. This period is probably less than half that which would be required to date of judgment, if this case goes to merit adjudication, although, as he is employed, he may not be being as generous as it first appears. If this cut-off does not suffice to make good any injury to defendant from not bringing the suit soon enough, he will accept any further cut the court may impose. He correctly cites *Chappelle* v. *United States*, 168 Ct. Cl. 362 (1964) that a claim to back pay for a period cut short by the plaintiff's concession cannot be defeated on laches on the theory defendant is asked to pay two salaries for an unreasonably long period. It still remains true that the doctrine of laches in pay cases was not made by judges solely and wholly to protect defendant from having to pay two salaries for one body in place on the job, over an unreasonably extended period. There are other reasons, and we will elaborate below what they are. Plaintiff's position does not detract from the weight of these other reasons. It does, however, moot the issue whether a

replacement for plaintiff was actually in fact hired, which seems to have been true, if at all, only in the broadest and most general sense. His specific slot was not refilled.

Second, plaintiff's most strongly urged point is his mental breakdown. Pursuing as he was a number of lawsuits after April 12, 1971, his stresses and anxieties mounted until in October 1972 he disappeared for three weeks, being found on a freeway several hundred miles from his home, unable to remember, to verbalize, or to form mental images. He has no memory of the three week period. He asserts, and we take it as true for summary judgment purposes, that he remained disabled up to the date he resumed employment, September 14, 1974. He would, of course, be unable to show he was "ready, able, and willing" to work during any such disability period. A person cannot receive back pay for a period when he was psychiatrically disabled. *Carter* v. *United States*, 206 Ct. Cl. 61, 509 F.2d 1150 (1975), *cert. denied*, 423 U.S. 1076 (1976). So in a sense his claim his disability lasted so long is disinterested. By it he further reduces his claim to a period ending October 1972.

Plaintiff throws out hints he may have been disabled before and after the period we allow. We think they should be disregarded for summary judgment purposes. A person who *pro se* institutes and maintains court proceedings and administrative appeals represents by implication that he is capable and competent of conducting his own affairs. If he wants this court to believe the contrary for a period selected by him, he should make a specific allegation. This plaintiff has done, with supporting affidavits, for the period we allow, but not for any longer period. Therefore, we hold, for purposes of defendant's motion, that plaintiff was disabled psychiatrically from some time in October 1972, to September 14, 1974, but that he was competent before and after those dates.

Plaintiff, when his disability ended, seems to have taken steps under the Freedom of Information Act, 5 U.S.C. § 552, to force the Civil Service Commission to divulge decisions in other cases that he might use in attacking the one made in his own. He was successful in the U. S. District Court,

but how this furthered achievement of his ultimate goal does not appear. His main reason for not suing here from September 14, 1974, to April 1, 1977, is that he does not claim for that period, but that alone does not suffice to stop laches running.

Apart from the two salaries argument, the traditional main reason for the laches doctrine is prejudice to defendant from the loss of evidence by death of witnesses, human forgetfulness, destruction of documents, etc. (Defendant points out that three key witnesses are dead.) *Brundage* v. *United States*, 205 Ct. Cl. 502, 504 F.2d 1382 (1974), *cert. denied*, 421 U.S. 998 (1975). In that case the two salaries argument was applicable only in the non-specific way that it is here.

Also in *Brundage* v. *United States*, *supra*, this court brought forward another reason to apply laches, that will often arise. Most pay cases, if they involve an adverse action, will also, often and perhaps even usually, involve allegations of misconduct against some official who was instrumental in effecting the adverse action. This is one of the reasons officials are reluctant to institute such actions when they should do so. They know it will lead to mud being thrown at them in a proceeding to which they are not parties and have no representation by counsel. *Brundage*, *supra*, was a signal illustration of this, for plaintiff's theory of his case required this court to believe that a retired officer, years before when on active duty, had falsified a record to conceal his own errors. Interviewed, the officer was unable to recall anything about the case. This court believed that in common fairness, this grave charge should have been put to the test of trial while memories were fresh. Because of needless delay in filing the suit, the petition was dismissed for laches.

Here the difference is that plaintiff seeks to expose not just one villain, but several. That difference does not exclude the application of *Brundage* as authority. To be specific, *e.g.*, after all these years he wants to depose his particular *bete noire*, Mr. Klein, who was the defendant in the Ninth Circuit suit. And there are many others.

Thus we think the authorities require the question of laches to be weighed, notwithstanding the shortening of the claim period and the relative weakness of the two salaries argument.

Plaintiff would account for not suing here in the pre-disability period, roughly a year and a half between exhaustion of remedies and mental breakdown, by the assertion that he could not file here until *Frommhagen* v. *Klein* was disposed of in the Ninth Circuit. But he has already persuaded us that case has no collateral estoppel effect here, because the sole issue there was whether defendant could remove him from his job before allowing a hearing. He cannot have it both ways. We conclude he could, and should, have filed here as soon as his administrative remedy was exhausted. Defendant could not have pleaded 28 U.S.C. § 1500, barring suits on claims on which plaintiff has a suit pending in another court. *Camero* v. *United States*, 170 Ct. Cl. 490, 345 F.2d 798 (1965) excludes cases where the suit in the other court is for relief not available here. We could not have reinstated plaintiff pending his hearing, the object of the other suit.

Plaintiff also, more weakly, suggests trouble getting counsel to defend him. We cannot take this seriously without supporting detail. Plaintiff is accustomed to representing himself and does an extremely good job at it, especially considering his purposes as we believe they are. He is indifferent to or affirmatively desires magnitude of record and longevity of proceedings. His object is to expose and confute the machinations of his enemies. He is relatively indifferent to money, having already discarded much of his back pay claim. The last paragraph of his petition leads us to believe he would, to keep the suit alive, discard all the rest of it except the necessary jurisdictional dollar. We find it hard to imagine the attorney who would work in harness with such a client at the reins, or in Bernard Shaw's deathless phrase, play horse to such a Lady Godiva. Counsel would always be demanding tactics unacceptable to the client: to shorten the record, to expedite the proceeding, to bring it to judgment, to earn his fee.

Thus, in view of the foregoing, our analysis of the laches issue is as follows: This suit is not really about money, except the minimum jurisdictional amount. In this respect, it is not unique; the same thing is generally true in our stigma-type military discharge cases. The conventional money argument in laches cases, that defendant is asked to pay two salaries for one person's work, is not decisive here, and weighs to such a small extent as not to influence our decision. It is absurd to have the laches question turn on plaintiff's being easy on defendant in his claim for damages, when money is not really what this suit is about. The question is whether the plaintiff has unduly and unfairly delayed the bringing of suit, and therefore the trial, in face of the inevitable loss of evidence that lapse of time causes, which is only illustrated here in the demise of witnesses, the unfairness to the living who are held with the sword of Damocles, plaintiff's charges against their ability and integrity, over their heads now over a decade, not counting the inevitable further time that would elapse before trial, and in face of the enormous record, which demanded a prompt trial even more than in the ordinary case. Plaintiff was not required to bring suit during his disability, but we do not simply extend the time for suing a length of time equal to the duration of the disability. Rather, when plaintiff emerged from his disability, we think he should have reviewed his intention to sue forthwith, in light of the obvious fact that the evils incident to his not suing promptly were still occurring, even if up to that point they were not his fault. Thus, if the two years lapse due to disability is excluded from the reckoning, still it shortens to some extent the time otherwise allowable, measured against the almost four years net delay in actually commencing the suit. To put it another way, whatever reprehensibility attaches to a failure to bring suit for a continuous four year period, is greater if the period is discontinuous, partly before and partly after a period of disability during which, however, the case did not stop getting stale and the involved officials were continually kept in apprehension. Plaintiff cannot say his charges should not be taken seriously: until they are withdrawn or

refuted they have to be taken seriously. Despite the immensity of the administrative record, plaintiff does not depend wholly upon it. He wants us to use it to pass on cross-motions raising merits issues, but since the oral argument he has written that some depositions will still be necessary.

We conclude that the plaintiff's delays in bringing this suit exceed by a wide margin the longest delay the doctrine of laches will permit. The plaintiff, both before and since the oral argument, has filed a number of motions all of which may be characterized as relating to the merits issues rather than the threshold question of laches. Our conclusion moots them, and accordingly, all are denied. Upon consideration of defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment, and the briefs and arguments of the plaintiff and counsel for defendant, the said cross-motion is denied, defendant's motion is granted, and the petition is dismissed.

Appendix B

IN THE UNITED STATES COURT OF CLAIMS

No. 177-77

LAURENCE H. FROMMHAGEN *v.* THE UNITED STATES	*Civilian Pay: Laches, Tolling of, by disability, summary judgment, record on.*

Laurence H. Frommhagen, Pro se.

Arlene Fine, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant.

Before COWEN, *Senior Judge,* NICHOLS and BENNETT, *Judges.*

ORDER

Plaintiff, invoking Rule 151, moves to "vacate the judgment, for a new trial, and to enter a different judgment." He suggests rehearing *en banc* according to Rule 7(d). Defendant has filed no response.

The court, for purposes of adjudicating laches as a defense, accepted plaintiff's contention as we understood it, that he was disabled from October 1972 to September 14, 1974, but pointed out that this had consequences with regard to his being "ready, able, and willing" to perform the job, from which he had been

separated, in that period. Now plaintiff rejects that holding. So far as concerned ability to sue in this court, he says he was disabled for a much longer period, but for all other purposes, he was hardly disabled at all, except from November 19, 1972 to January 2, 1973. We are unable, for laches purposes, to accept this notion of selective disability for one unique and special purpose. A litigant cannot thus embrace his disability when it is to his litigation advantage to do so, and reject it when, in the same litigation, the disability would be disadvantageous. If we conclude, as plaintiff would have us do, that except for two and one-half months plaintiff was not disabled for purposes other than suing in this court, we must also conclude that disability drops out of consideration as tolling the laches period.

Plaintiff shows that some attorneys would have represented him in this case except for his inability to meet their fee demands. From our observation of plaintiff representing himself, we concluded that his attitude towards the judicial process would impair the willingness of most attorneys to be retained on his behalf. Some attorneys might well ask for a fee they knew the client could not or would not pay, as a palliative to outright rejection. The reasons for inability to obtain counsel do not matter in view of plaintiff's willingness to represent himself, and his normal practice of doing so. Time spent seeking for counsel might excuse some delay in bringing suit, but far less than the almost six years of delay herein.

Plaintiff seems to believe that on summary judgment, absent a trial, he could open up the record to introduce additional evidence: "a few depositions," including that of Harold P. Klein. This is wrong, because in pay cases involving review of Civil Service Commission decisions, the record as it was before the Commission cannot be supplemented at the summary judgment stage. *Shanteau v. United States*, 208 Ct. Cl. 983 (1975). In such cases, at times, added evidence is taken, but at trial. Thus a trial is necessary for the "few

depositions" to get in. In the event of a trial, of course defendant also could offer evidence. It would not be required to use the testimony at the administrative proceedings. What influence the gigantic administrative record would have on the duration of a trial, should there be one, is speculative, but trial is not the whole of a case. We continue to believe in the probability of a litigation of extended duration should we not dispose of the case, as we have done, on summary judgment. Plaintiff cannot ask for "a few depositions" and in the same breath claim he has made a trial unnecessary.

With respect to the suggestion for rehearing *en banc*, a majority of the judges of the court on regular active service not having voted to rehear the case, the suggestion is denied, without oral argument.

Accordingly, plaintiff's motion to vacate the judgment, for a new trial, and to enter a different judgment, is denied.

BY THE COURT

PHILIP NICHOLS, JR.
Judge, Presiding

Appendix C

IN THE UNITED STATES COURT OF CLAIMS

No. 177-77

LAURENCE H. FROMMHAGEN
v.
THE UNITED STATES

Before NICHOLS, *Judge,* Presiding, COWEN, *Senior Judge* and BENNETT, *Judge.*

ORDER

This case comes before the court on plaintiff's motion, filed September 12, 1978, pursuant to Rule 152(b), for "correction of the judgment and for reopening of the proceeding" requesting that the court correct its order entered herein on June 23, 1978 denying plaintiff's motion for rehearing, to vacate the judgment and for new trial. Upon consideration thereof, without oral argument,

IT IS ORDERED that plaintiff's said motion, filed September 12, 1978, be and the same is denied.

BY THE COURT

Philip Nichols, Jr.
Judge, Presiding